

REMARKS

The applicants have amended certain descriptions in the Specification and the Claim with the objective of presenting a full, clear, and complete description of the cultivar in order to comply with 37 CFR 1.163 and 35 U.S.C. 112 and to overcome the objections listed in the Office Action. Specifically:

In response to the objections set forth in paragraph A of the Office Action, the Specification has been amended in order to disclose the botanical classification of the claimed plant in the appropriate location.

In response to the objections set forth in paragraph B of the Office Action, the Specification has been amended in order to disclose the age of the observed plant.

In response to the objections set forth in paragraph C of the Office Action, the Specification has been amended in order to disclose the average time for root development of the claimed plant.

In response to the objections set forth in paragraph D of the Office Action, the Specification has been amended in order to disclose the length and diameter of the flower bud of the claimed plant.

In response to the objections set forth in paragraph E of the Office Action, the Specification has been amended in order to disclose the length, width, and texture of the flower petals of the claimed plant.

In response to the objections set forth in paragraph F of the Office Action, the Specification has been amended in order to disclose the size and number of the reproductive organs of the claimed plant.

In response to the objections set forth in paragraph G of the Office Action, the Specification has been amended in order to disclose the length and diameter of the stem of the claimed plant.

In response to the objections set fourth in paragraph H of the Office Action, the Specification has been amended to use the appropriate terms for leaf texture of the claimed plant.

In response to the objections set fourth in paragraph I of the Office Action, the applicant respectfully submits that the specimen under examination was grown in a greenhouse in a 15 cm pot. Specimens of this nature are not observed for the duration of time required to produce mature seed. Therefore, the applicant maintains that the presence of mature seed has not been, observed.

In response to the objections set fourth in paragraph J of the Office Action, the Specification has been amended to disclose the cold tolerance of the claimed plant.

In response to the Examiner's rejection based on 35 USC § 102(b), dated 15 May 2003, the applicants respectfully submit the following statement:

In the Office Communication, under the heading 35 U.S.C. 102, the Communication states:

"The published grants and applications are each "printed publications" under 35 U.S.C. 102 because they are accessible to persons concerned with the art to which the document relates. See *In re Wyer*, 655 F.2d 221, 226; 210 USPQ 790, 794 (CCPA 1981). See also MPEP section 2128.

For example, UPOV publishes the application number, grant number, date of publication, species of plant, and variety denomination for PBR certificates, and copies of the grant and application are obtainable through the Plant Variety Rights Journal. Thus, information regarding the claimed cultivar, in the form of the publications noted above, was readily available to interested persons of ordinary skill in the art.

A printed publication can serve as a statutory bar under 35 U.S.C. 102 (b) if the reference, combined with knowledge in the prior art, would enable one of ordinary skill in the art to reproduce the claimed plant. In

re LeGrice, 301 F.2d 929, 133 USPQ 365 (CCPA 1962). If one skilled in the art could reproduce the plant from a publicly available source, then a publication describing the plant would have an enabling disclosure. See *Ex parte Thomson*, 24 USPQ 2d 1618, 1620, (Bd. Pat. App. & Inter. 1992) ("The issue is not whether the [claimed] cultivar Siokora was on public use or sale in the United States but, rather, whether Siokora seeds were available to a skilled artisan anywhere in the world such that he/she could attain them and make/reproduce the Siokora cultivar disclosed in the cited publications").

While the publications cited above disclose the claimed plant variety, a question remains as to whether the references are enabling. If the plant was publicly available, then the published application, combined with the knowledge in the prior art, would enable one of ordinary skill in the art to reproduce the claimed plant. The ability of the Office to determine whether the claimed plant was publicly available is limited. Electronic and paper search within the Office has not revealed any evidence that the claimed plant was on sale anywhere in the world. However, the claimed plant may have been sold at the wholesale level, sold under a different name, or even distributed to interested parties (i.e. the public) free of charge. Since the inventor and the assignee (if applicable) of the instant application are in the better position to know when, if ever, the claimed plant was made publicly available, the Examiner is requiring this information per the attached Requirement for Information Under 37 CFR 1.105."

The Applicants respectfully challenge the position and policy stated in the Office Communication that the foreign published PBR Applications and Grants enabling disclosures under 35 U.S.C.102 (b) for the following reasons:

1. 102(b) is not applicable to Plant Patent Applications as it is to Utility Patent Applications.
  - a. Foreign Commercial or Public Use is Not a Bar to Patentability Under 35 U.S.C. 102(b).

Prior to the Patent Act of 1897, any public use or sale of an invention for more than two years prior to the date of application for a patent was a bar to patentability. In 1892, the U.S.

Supreme Court, in the landmark case of *Gandy et al. v. Main Belting Co., et al.*, 143 U.S. 587, 12 S.Ct. 598 (US 1892), concluded that Congress only intended that public use or sale of an invention in the United States could affect the patentability of that invention in the United States.

The Gandy case involved a U.S. patent for a canvas belt used to drive pulleys in machinery. The new canvas belt was unique in that the warp threads were stouter than the weft threads. The defendant argued that the invention had been in use in England more than 2 years prior to the U.S. filing date. The Gandy court states:

... There is no direct testimony to show whether this canvas was made up into belting, or when the belts were first publicly used or sold abroad; indeed, nothing to show it was in public use or on sale before the application for the patent in this suit was filed. Even if we were authorized to presume that such canvas was manufactured into belting and sold or used in England, there is not a particle of testimony tending to show that it was publicly used or put on sale in this country. Conceding that there was sufficient evidence of the use of such belting in England, we think this does not vitiate the patent.

*Gandy et al. v. Main Belting Co., et al.*, 143 U.S. at 592, 12 S.Ct. at 600. [Emphasis added.]

After a careful analysis of the relevant statutes, the Gandy court concluded that public use or sales activity outside of the United States should not be considered in determining the patentability of inventions in the United States:

... we think it was manifestly the intention of congress that the right of the patentee to his invention should not be denied by reason of the fact that he had made use of it, or put it on sale abroad, more than two years before the application, provided it were not so used or sold in this country.

*Gandy et al. v. Main Belting Co., et al.*, 143 U.S. at 593, 12 S.Ct. At 600. [Emphasis added.].

The Patent Act of 1897 codified the Gandy decision by expressly adding the requirement that public or on sale activity must occur within the United States to bar patentability. According to the 1897 act, a patentable invention must not be:

... patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned.

Act of March 3, 1897, ch. 391, Sec. 1, 29 Stat. 692.

No change to the law or interpretation by the courts since the 1897 Patent Act has modified the clear intent of the Congress on this point: Foreign public or commercial use is not a barring activity under 35 U.S.C. 102(b). Public availability or on-sale activity of the invention or plant in a foreign country is not a factor in determining patentability under 35 U.S.C. 102(b).

*In re LeGrice*, 133 USPQ 365 (CCPA 1962), demonstrates the application of this fundamental principle to plant patents. The LeGrice court discusses Section 102(b), stating:

...The underlying concept on which the courts permitted such a bar is that the description of the invention in the printed publication was sufficient to give possession of the invention to the public.

*In re LeGrice*, 133 USPQ, 301 F.2d at 931.

In the LeGrice case, the USPTO rejected two plant patent applications for rose varieties under Section 102(b), on the ground that both varieties had been described in printed publications in England more than one year prior to the U.S. filing dates. The court describes the publications as follows:

... The publications occur in the National Rose Society Annual of England and in catalogues. The annual describes appellant as having raised the roses described and the catalogues show color pictures of these roses. There is

no dispute that the publications relate to and picture the identical roses which were originated by appellant and he now seeks to patent.

In re LeGrice, 133 USPQ, 301 F.2d at 930.

Under these facts, the LeGrice court was clearly presented with evidence not only of printed publications, but also of foreign public use of the rose varieties, taking into consideration the following points:

1. The Dusky Maiden rose is identified as receiving the Gold Medal Award in 1949, which indicates that it was inspected and evaluated by one or more rose experts, other than the breeder, to merit such an award. This is public use.
2. The Charming Maid is described as receiving an award titled "Gold Medal Provincial Show, 1953," which indicates that the variety was displayed at a "show" attended by the public, including at a minimum the rose experts who conferred the Gold Medal upon this variety. This is public use.
3. The breeder himself admits that both the Dusky Maiden and the Charming Maid rose varieties were displayed in "catalogues" more than one year prior to the U.S. filing date. The word "catalogue" has not changed much in the last 100 years, and it is commonly used to describe a list of products for sale. Display of the roses in "catalogues" indicates that both roses were offered for sale at the time the catalogues were published.<sup>2</sup> This is public use.

How does the LeGrice court treat such clear evidence of public use of a plant variety in a foreign country more than one year prior to the U.S. plant patent filing date? Quite simply, the LeGrice court disregards the evidence as immaterial to its analysis of the 102(b) rejection based upon printed publications. This approach is completely consistent with America's underlying philosophy regarding barring prior art - first enunciated in Gandy - if the reference does not make the invention available to the American public, then it cannot bar the patenting of the invention in America.

The LeGrice court summarizes the issues under consideration as follows:

Resolution of the issue on these appeals requires us to determine whether as a matter of law, the English publications constitute, within the meaning of 35 U.S.C. 102(b), a bar to appellant's right to patents on said applications.

The applicable portion of 35 U.S.C. 102(b) reads:

'A person shall be entitled to a patent unless - \* \* \* (b) the invention was \* \* \* described in a printed publication \* \* \* more than one year prior to the date of the application for patent in the United States, \* \* \*.'

In re LeGrice, 133 USPQ 365.

In reciting the pertinent parts of Section 102(b), the LeGrice court skipped over - deleted - the words "public use or sale in this country" - in the clear face of evidence of public use and sales of the rose varieties in England more than one year prior to the U.S. filing date. The LeGrice court goes on to determine the meaning of the term "printed publication," but at no point does the court discuss the impact of any public or on-sale activity has occurred. Applicant submits that the LeGrice court recognized that public or on-sale activity occurring in a foreign country is clearly irrelevant to a determination of patentability under 35 U.S.C. 102(b). The possibility of foreign public or on-sale activity, even when coupled with a description of the plant varieties in printed publications, did not even bear mentioning by the LeGrice court, let alone considering.

Allied Colloids Inc. v. American Cyanamid, 64 F.3d 1570 (Fed. Cir. 1995), provides another example of the Federal Circuit setting forth the facts which constitute a foreign commercial or public use, and then treating those facts as immaterial to its 102(b) legal analysis. In Allied Colloids, the court considers the validity under 35 U.S.C. 102(b) of a patented process which had been the subject of testing in England and the U.S. prior to the filing of a U.S. patent application:

. . . At Colloids' invitation samples of Detroit sludge were sent to England for testing. After some favorable test results in England, about twenty samples of Colloids' sewage treatment materials were brought to Detroit for testing on fresh Detroit sewage. These samples were about two to four ounces in size. They were tested on April 16-17, 1985, in a laboratory located at a Detroit sewage treatment plant. The tests showed promising results for some of Colloids' products. Additional laboratory tests were conducted in Detroit in July 1985, and plant scale trials were conducted in Detroit in December 1985. Colloids' patent application was filed in the United States on April 23, 1986; thus only the first series of tests is relevant to the asserted public use bar, i.e. the April 16-17, 1985 tests.

*Id.* at 1573.

The Allied Colloids court treated as immaterial the tests which were done in England, as that foreign public use is not a factor in determining patentability under 35 U.S.C. 102(b) because it did not occur in this country. Once again, the foreign activity was immaterial because it did not make the invention available to the American public.

The statute and legislative history on this point is crystal clear: The possibility, or even conclusive proof, of commercial or public use of the claimed variety of the present invention in a foreign country is not relevant to the determination of "plant patentability" under 35 U.S.C. 102(b).

**b. The Description in a Printed Publication must be Enabling to the American public to Bar Patentability under 35 U.S.C. 102(b).**

Under 35 U.S.C. 102(b), an invention is not patentable if it was described in a printed publication, in this or a foreign country, more than a year prior to the filing date of the U.S. application. In order for a printed publication to serve as a reference under 35 U.S.C. 102(b), it must enable the invention. *In re Donohue*, 766 F.2d 531, 533 (Fed. Cir. 1985) ("Even if the claimed invention is disclosed in a printed publication, that disclosure will not suffice as prior art if it was not enabling."); *In re Paulsen*, 30 F.3d 1475, 1478 (Fed. Cir. 1994) ("A rejection for

anticipation under section 102 requires that each and every limitation of the claimed invention be disclosed in a single prior art reference. . . In addition, the reference must be enabling and describe the applicant's claimed invention sufficiently to have placed it in possession of a person of ordinary skill in the field of the invention."); Advanced Display Systems Inc., v. Kent State University, 54 USPQ2d 1673, 1679 (Fed. Cir. 2000) (". . . invalidity by anticipation requires that the four corners of a single, prior art document describe every element of the claimed invention, either expressly or inherently, such that a person of ordinary skill in the art could practice the invention without undue experimentation."). See also In re LeGrice, 133 USPQ 365 (CCPA 1962); Helifix Limited v. Block-Loc, Ltd., 208 F.3d 1339, 1346 (Fed. Cir. 2000), In re Sasse, 629 F.2d 675 (CCPA 1980), Constant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1570 (Fed. Cir. 1988) citing Kalman v. Kimberly Clark Corp., 713 F.2d 760, 771 (Fed. Cir. 1983).

A written description of a plant variety is simply not enabling. Plant patents have always been exempt from the Section 112 written enablement requirement which applies to all utility patents - in recognition that a particular plant simply cannot be made by reference only to a printed publication. Congress acknowledged this concept when the Plant Patent Act of 1930 was drafted. See In re Bergy, 596 F.2d 952, 984 (CCPA 1979) (discussing the inclusion of the language which is now 35 U.S.C. 162: "Under existing law, it was not seen how a plant could be described in a written document so as to comply with the written description requirement pertaining to "utility" patents.")

The court in In re LeGrice confirmed this point:

. . . The proper test of a description in a publication as a bar to a patent as the clause is used in section 102(b) requires a determination of whether one skilled in the art to which the invention pertains could take the description of the invention in the printed publication and combine it with his own knowledge of the particular art and from this combination be put in possession of the invention on which a patent is sought. Unless this condition prevails, the description in the printed publication is inadequate as a statutory bar to patentability under section 102(b).

In re LeGrice, 49 CCPA 1124 at 1138.

The LeGrice court discussed the permissibility of combining the "description of the invention in the printed publication" with "knowledge of the particular art" to achieve the invention on which a patent is sought:

The mere description of the plant is not necessarily an 'enabling' disclosure. Such descriptions, just as in the case of other types of inventions, in order to bar the issuance of a patent, must be capable, when taken in conjunction with the knowledge of those skilled in the art to which they pertain, of placing the invention in the possessions of those so skilled.

\* \* \*

. . . While the present knowledge of plant genetics may mean as a practical matter, that the descriptions in such general publications as are here involved cannot be relied upon as a statutory bar under section 102(b), we must be mindful of the scientific efforts which are daily adding to the store of knowledge in the fields of plant heredity and plant eugenics which one skilled in this art will be presumed to possess.

In re LeGrice, 133 USPQ 365

In order for a printed publication to be a 102(b) reference, it must be an enabling reference. A printed reference is enabling if a reader of the publication possessing ordinary skill in the art would be able to make and use the invention described without undue experimentation. Propagation of new varieties of roses has been increasingly technical, requiring (H.I.D.) High Intensity Discharge Lighting systems supplying a minimum of 80 watts output/square meter of greenhouse for a minimum of 22 hours per day, fog propagation systems, computer controlled temperature, computer controlled fertilizer injection of nutrients, and ultra-violet pasteurization of all irrigation water used in propagation. The hybridizer requires that anyone propagating and growing the variety utilizes the aforementioned facilities. The hybridizer supplies propagators with detailed information concerning propagation and growing techniques for the variety. The documents being referred to by the Examiner shed no light on the requirements for propagation of the variety. A person skilled in the art would not have access to plant material of the variety, since

the variety was under US quarantine until June, 1999.

Herein lies the fundamental distinction which sets plant patents apart from utility patents: A plant patent only confers protection on the plant which was invented (not a plant with the same characteristics), and its asexual progeny. See *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1566 (Fed. Cir. 1995). A written description of a plant variety may be capable of directing a breeder to independently create a new plant variety having the characteristics of the described plant. However, the newly created plant would not infringe the described plant, because it was not asexually produced from the germplasm of the described plant.

Technology does currently exist which would allow a reader of a printed document to make a clone of a particular plant without access to the plant material itself, even in the simplest of plant species, let alone the *Rosa* species. Therefore, a printed publication which is available to the American public without corresponding availability of the actual plant material does not, and cannot, at the current level of technology, make the described plant available to the American public.

## 2. In re Legrice and Imazio Govern the Application of 102(b) to Plant Patents, Not ex Parte Thomson.

*Ex parte Thomson*, 24 USPQ2d 1618, 1620 (BPAI 1992) involved utility patent protection for a sexually propagated cotton plant. Both *In Re LeGrice*, 133 USPQ 365, 301 F.2d 929 (CCPA 1962); and *Imazio Nursery, Inc. v. Dania Greenhouses*, 69 F.3d 1560, 1566 (Fed. Cir. 1995) involved plant patent protection for asexually propagated plants. There are fundamental differences between utility patents and plant patents, and between sexually propagated plant varieties and asexually propagated plant varieties. These differences dictate that *Ex Parte Thomson* does not, and cannot, control the application of 102(b) to plant patents.

For many years there was considerable debate in the courts about the scope of claim protection for plant patents. The question was whether the single claim of a plant patent covered "a plant" matching the botanical description in the patent specification, or only "the plant" which was the subject of the patent and that plant's asexual progeny. This debate was resolved conclusively in 1995 by the Federal Circuit in the *Imazio* case. The *Imazio* court states:

It is clear from the legislative history that as a result of the asexual reproduction requirement, only a single plant, i.e., reproduction from one original specimen in the words of Congress, is protected by a plant patent. At the time of enactment, Congress recognized that the asexual reproduction prerequisite greatly narrowed the scope of protection of plant patents but found such a limitation necessary to ensure that the characteristics of the plant to be patented were maintained.

\* \* \*

In view of the statutory language, the legislative history, the case law, the views of the commentators, and a review of relevant provisions of the PVPA, we conclude that the scope of a plant patent is the asexual progeny of the patented plant variety. Variety as used in section 161 encompasses a single plant, the plant shown and described in the specification.

Imazio Nursery, Inc. v. Dania Greenhouses, 69 F.3d at 1566 and 1568.

Having resolved the issue of the scope of protection of a plant patent, the Imazio court then considered the elements required to establish infringement of a plant patent, and the defenses to an allegation of infringement. Essentially, there is a single element:

We must construe the term asexual reproduction in section 163 in the same way as we did in section 161. Thus, for purposes of plant patent infringement, the patentee must prove that the alleged infringing plant is an asexual reproduction, that is, that it is the progeny of the patented plant.

Imazio Nursery, Inc. v. Dania Greenhouses, 69 F.3d at 1569.

From a practical standpoint, this requirement means that the patentee must prove that the infringer had physical access to the patented plant or its progeny. The asexual

reproduction requirement of plant patent infringement also means that plant patents are subject to a unique defense in the patent world - independent creation. The Imazio court explains:

... The statute requires asexual reproduction of the patented plant for there to be infringement. It is necessarily a defense to plant patent infringement that the alleged infringing plant is not an asexual reproduction of the patented plant. Part of this proof could be, thus, that the defendant independently developed the allegedly infringing plant. However, the sine qua non is asexual reproduction. That is what the patentee must prove and what the defendant will seek to disprove.

Imazio Nursery, Inc. v. Dania Greenhouses, 69 F.3d at 1570.

The Plant Patent Act itself also notes a significant difference between plant and utility patents. Title 35 USC Section 162 provides:

No plant patent shall be declared invalid for noncompliance with section 112 of this title if the description is as complete as is reasonable possible.

The legislative history of Section 162 makes it perfectly clear that Congress knew that it was not possible to enable a plant patent by a mere written specification, and so relaxed the Section 112 requirements for that reason.

Ex parte Thomson involved an application for a utility patent, in which the claimed invention was "a plant" having the described features. Claims 1 and 2 are illustrative:

1. A cotton cultivar having the designation Siokra (ATCC 40405).
2. Seeds of the cotton cultivar according to Claim 1.

Ex parte Thomson at page 1619.

The scope of a utility patent claim encompasses any device having the characteristics described in the claim, as supported by the specification. In the case of a utility claim for a plant variety, the claim encompasses "any plant" having the described characteristics, regardless of origin. More than one claim is permissible in a utility patent.

Utility patents are clearly very different from plant patents. First, the scope of a claim in a utility patent covers "a plant" matching the plant described in the specification. Second, Section 112 applies with full force to utility patents. Third, there is no requirement to prove direct access to the patented object or technology in order to prove infringement of a utility patent claim. And fourth, independent creation is absolutely not a defense to an allegation of utility patent infringement.

These differences carry through to the examination strategy which must be employed to properly examine a plant patent application. The unique and very narrow scope of protection offered by a plant patent has a direct impact on the scope of prior art which can be properly considered in determining the patentability of a new plant variety. Because a plant patent cannot be infringed without direct access to the new plant or its asexual progeny, it is the applicant's position that a new plant variety cannot be anticipated without direct access to the American public in the United States of the new plant or its asexual progeny.

To illustrate applicant's position that "a plant patent cannot be anticipated without direct access to the new plant," consider the following scenario: A hypothetical one thousand page treatise about a new plant variety has been published. The treatise is devoted to a description of the plant invention of the present application in excruciating detail. Now suppose that all propagatable plant material for the variety dies. What happens to the invention? It ceases to exist, regardless of the existence of the treatise. The treatise is a bar to patentability under 35 U.S.C. 102(b) only if it contains within its pages the information required to "resurrect" the invention. No matter how skilled or knowledgeable, a worker in the art of plant breeding could not "resurrect" the variety from the printed page without propagatable plant material to work with. Therefore, the treatise is not prior art under 35 U.S.C. 102(b) because it does not put the invention in the possession of the public. A Plant Breeder's Right Certificate provides far less descriptive information than would the hypothetical one thousand page treatise, and clearly is not prior art under 35 U.S.C. 102(b).

In the case of a plant patent, propagatable material of the new variety is not only

essential to enable the invention - it is the invention. In the absence of propagatable material, the variety does not exist, nor can it be conjured up from the description in any printed publication, regardless of how detailed or specific. So, in the absence of any publicly available asexually propagatable plant material in the United States, no plant variety can, at the present level of technology, be anticipated by a mere printed publication, regardless of how detailed it is, and regardless of where it is published. Foreign asexually propagatable plant material, unlike the information in a printed publication, is not freely accessible to the American public. The quarantine laws of the United States strictly prohibit the importation of all asexually propagatable rose plant material unless that material goes through a U.S. Department of Agriculture approved quarantine facility. The variety descriptions and current status of plant material in the U.S. quarantine program are public information, but the plant material itself is not available to any member of the American public other than the importing person, and then only after the quarantine procedures have been completed.

The court in *In re LeGrice* established a perfectly workable and rational approach for applying the policy and the language of 102(b) to this unique situation. The *In re LeGrice* case was concerned with whether or not foreign plant varieties are actually available to the American public, and acknowledged that at some future point in time, a mere printed publication might enable a person to make an genetic duplicate, or clone, of a particular plant without access to the plant material itself. The Applicant does not believe that day is here yet. The holding of *In Re LeGrice* is thus applicable to, and controlling, in the present case

Additionally, "Ex parte Thomson", an internal Board of Patent Appeals and Interferences decision, concerning a utility patent application for a sexually propagated cotton variety; cannot overturn "*In re LeGrice*", which is a decision of the U.S. Court of Customs and Patent Appeals. The decision of the court must be the controlling law when compared to an internal decision of an Administrative Agency.

3. "Ex parte Thomson", an internal Board of Patent Appeals and Interferences decision cannot overturn "*In re LeGrice*", which is a decision of the U.S. Court of Customs and Patent Appeals.

"Ex parte Thomson", an internal Board of Patent Appeals and Interferences decision, in an internal Patent and Trademark Office ruling concerning a utility patent application for a sexually propagated cotton variety; cannot overturn "In re LeGrice", which is a decision of the United States Court of Customs and Patent Appeals that dealt specifically with an asexually propagated rose variety. An internal Board of a Federal Agency cannot overturn the decision of a Federal Court of Appeals, as is the U.S. Court of Customs and Patent Appeals.

4. The Facts of the Present Case Are Materially Distinguishable from the Facts of ex Parte Thomson.

For the sake of argument, the Applicant will suppose for a moment that the Board's holding in Thomson is controlling in the present case. The Thomson Board concluded, as noted above, that a published description of Siokra cotton was a bar to patentability under 35 U.S.C. 102(b), because Siokra seeds were presumably available to the skilled worker. In the Office Communication, it is argued that the cited Plant Breeder's Rights Applications and Certificates are a bar to patentability of the claimed new variety under 35 U.S.C. 102(b), because propagatable material of the variety is presumably available to the skilled worker. The Applicant respectfully contests the argument. First, as emphasized above, Plant Breeder's Rights Applications and Certificates fail as references under 35 U.S.C. 102(b) for lack of enablement. Second, propagatable material is not available to the skilled worker in the United States.

The new plant variety of the present application originated in Denmark. U.S. laws prohibit the direct importation and use of the variety into the United States, unless the variety has first been subjected to and passed the USDA quarantine and screening regimen. The claimed variety is not generally available to any person, skilled or otherwise, in the United States due to the prohibition of direct importation and use of the plant material of the genus Rosa by the Plant Protection and Quarantine Regulations overseen by the Animal and Plant Health Inspection Service of the U.S. Department of Agriculture. Prior to and after release from quarantine, the variety was grown in a locked test nursery controlled by the Applicant, with the objective of completing the quarantine process and confirming the compatibility of the variety with U.S. growing conditions. No other person in the United States had access to the variety.

In the United States, a skilled worker cannot combine the description of the new

variety in the cited foreign Plant Breeder's Rights Applications and Certificates with propagatable plant material, because propagatable plant material is not available in this country due to quarantine restrictions. An important distinction must be made here between the plant material required to reproduce the present variety, and the seeds required to reproduce Thomson's Siokra cotton variety, which was the subject of a utility patent application. As discussed in detail herein, plant material for prohibited varieties (including the present invention) must go through USDA quarantine before the material is accessible to any person in the United States. The quarantine process takes two full growing seasons. In contrast, cotton seed may be admitted into the United States after fumigation and inspection, a process which can take as little as a few days. See 7 C.F.R. 319.8 et seq. (1999).

As discussed above, the public policy favoring ". . . prompt and widespread disclosure of inventions to the public," Western Marine Electronics, Inc. v. Furuno Electric Co., Ltd., 764 F.2d 840 (Fed. Cir. 1985), refers to disclosure of inventions to the American public. Disclosure of inventions in a way that does not benefit the American public does not fulfill the Constitutional mandate to "promote science and the useful arts." Constitution of the United States of America , Article I, Section 8.

Furthermore, the prohibition against patenting set forth in 35 U.S.C. 102(b) is intended, in part, to "protect the public in the prior use of an invention," or in other words to avoid the granting of a monopoly. A monopoly is "the exercise of an exclusive privilege granted to anyone for the sole buying, selling, making, working, or using anything which the public had before the exclusive privilege was granted. . . a monopolist is one who by reason of this exclusive privilege takes something from the public which they had a right to use before the grant of such exclusive privilege." Ernest B. Lipscomb III, Lipscomb's Walker on Patents (The Lawyer's Cooperative Publishing Co. 1985), section 1:6 at 39.

In the present case, the American public had no right, or reasonable expectation of a right, to propagate the claimed variety prior to the filing of the plant patent application. The variety was under the control of the foreign owner, who had not released the variety to the United States. It was not until a testing agreement was reached with a U.S. grower that the owner of the variety was willing to make the variety available in this country. No other entity in the United States has had access to the plant material in the United States until 11 months prior to the application for Plant Patent.

For the foregoing reasons, the Applicant asserts that the cited Plant Breeder's Rights Certificates are not a bar to patentability of the claimed new variety under 35 U.S.C. 102(b), because propagatable material of the variety is not available to the skilled worker in the United States.

In summary, the Applicants respectfully challenge the Examiner's position as outlined in the 15<sup>th</sup> of May Office Communication as being a substantive policy change without appropriate procedures under USC Title 5, Administrative Procedures Regulations; and other Federal rules and regulations which prohibit retroactive actions as outlined herein.

Respectfully submitted,

By \_\_\_\_\_

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### SUMMARY OF THE INVENTION

The present invention constitutes a new and distinct variety of miniature rose plant which originated from a controlled crossing between an unnamed seedling and 'POULjol'. The two parents were crossed and the resulting seeds were planted in a controlled environment. The new variety is named 'POULmist'.

The new rose may be distinguished from its seed parent, an unnamed seedling, by the following combination of characteristics.

- 1. The unnamed seed parent is a miniature rose variety with bi-color red and yellow flowers.

The new variety may be distinguished from its pollen parent, 'POULjol', a non-patented rose created by the same inventors, by the following combination of characteristics:

- 1. The pollen parent has blooms which are a more muted yellow than that of 'POULmist's blooms.
- 2. The flowers of 'POULmist' have significantly better longevity than 'POULjol'.

The objective of the hybridization of this rose variety for commercial culture was to create a new and distinct variety with unique qualities, such as:

- 1. Uniform and abundant flowers;
- 2. Vigorous and compact growth;
- 3. Year-round flowering under glasshouse conditions;
- 4. Suitability for production from softwood cuttings in pots;
- 5. Durable flowers and foliage which make a variety suitable for distribution in the floral industry.

The combination of qualities of this variety represents significant improvement over previously available commercial cultivars of this type and distinguishes 'POULmist' from all other varieties of which

we are aware.

As part of their rose development program, L. Pernille Olesen and Mogens N. Olesen germinated the seeds from the aforementioned hybridization and conducted evaluations on the resulting seedlings in a controlled environment in Fredensborg, Denmark.

'POULmist' was selected by the inventors as a single plant from the progeny of the hybridization in May of 1997.

Asexual reproduction of 'POULmist' by cuttings and traditional budding was first done by L. Pernille and Mogens N. Olesen in Fredensborg, Denmark, in August of 1997. This initial and other subsequent propagations conducted in controlled environments have demonstrated that the characteristics of 'POULmist' are true to type and are transmitted from one generation to the next.

#### BRIEF DESCRIPTION OF THE DRAWING

The accompanying color illustration shows as true as is reasonably possible to obtain in color photographs of this type, the typical characteristics of the buds, flowers, leaves, stems, and a plant of 'POULmist'. Specifically illustrated in SHEET 1:

1. Flowering stem showing branching and the attachment of leaves, buds, and peduncles;
2. Flower bud, partially opened bud, and open bloom;
3. Flower petals, detached;
4. Sepals, receptacle, and pedicel;
5. Bare stem exhibiting thorns;
6. Leaves.

#### DETAILED DESCRIPTION OF THE VARIETY

The following is a description of 'POULmist', as observed in its growth in glasshouses in, Half Moon Bay, California. Color references are made using the Royal Horticultural Society (London,

England) Colour Chart, 1995, except where common terms of color are used.

For a comparison, several physical characteristics of the rose variety 'POULgelb', a miniature rose variety from the same inventors described and illustrated in U.S. Plant Patent No. 9,401 and issued on 19 December, are compared to 'POULmist' in Chart 1.

CHART 1

|                             | <u>'POULmist'</u>                                     | <u>'POULgelb'</u>                                     |
|-----------------------------|---|---|
| Petal Color, Upper Surface: | Yellow Group 12B/C.                                   | Yellow Group 13C.                                     |
| Petal Color, Lower Surface: | Yellow Group 12D.                                     | Yellow Group 13C.                                     |
| Petalage:                   | Very Double: 35 to 40 petals under normal conditions. | Very Double: 30 to 40 petals under normal conditions. |

Parents: \_\_\_\_\_

Classification: \_\_\_\_\_

Botanical: Rosa hybrida.

Commercial: Miniature.

FLOWER AND FLOWER BUD

Blooming habit: Continuus.

Flower bud:

Size: Upon opening, 10 mm - 13 mm in length from base of receptacle to end of bud.

Bud form: Medium, pointed ovoid.

Bud color: As sepals unfold, Yellow Group 9B, Yellow Group 9B at  $\frac{1}{2}$  opening.

Sepals: Yellow-Green Group 144A. Strong foliaceous

appendages on three of the five sepals.  
Surfaces of sepals moderately pubescent.  
Stipitate glands are present on edges of  
sepals

Receptacle:

Surface: Smooth.  
Shape: Cup-shaped.  
Size: 5 mm (h) x 6 mm (w).  
Color: Yellow-Green Group 144A.

Peduncle:

Surface: Smooth.  
Length: 50 to 60 mm average length.  
Color: Yellow-Green Group 144A.  
Strength: Upright.  
Borne: Generally with 1 to 2 buds per flowering  
stem.

Flower bloom:

Fragrance: None.  
Duration: As a pot plant, flowers last from 14 to 17  
days. As a cut flower 5 to 7 days.  
Size: Small for a 15 cm pot rose. Average flower  
diameter is 40 mm when open.

Form:

Shape of flower when viewed from the side:  
Upon opening, upper part: Convex.  
Upon opening, lower part: Convex.  
Open flower, upper part: Convex.  
Open flower, lower part: Concave.

Petalage: Average range: 35 to 40 petals under normal  
conditions with 3 to 4 petaloids.

Color:

Upon opening, petals:

Outermost petals.

Upper Surface: Yellow Group 12 A/B.

Reverse Side: Yellow Group 12 A/B.

Innermost petals.

Upper Surface: Yellow Group 12 A/B.

Reverse Side: Yellow Group 12

A/B.

Upon opening, basal petal spots:

Outermost petals.

Outer Side: Yellow Group 11D.

Inner Side: No petal spots

observed.

Innermost petals.

Outer Side: Yellow Group 11D.

Inner Side: No petal spots observed.

After opening, petals:

Outermost petals.

Upper Surface: Yellow Group 11C.

Reverse Side: Yellow Group 11C.

Innermost petals.

Upper Surface: Yellow Group 11C.

Reverse Side: Yellow Group 11C.

After opening, basal petal spots:

None observed.

General Tonality: On open flower Yellow Group 12 B. No change in the general tonality at the end of the 8th day. Afterwards, general tonality is Yellow Group 11C.

Petals:

Petal Reflex: Double.

Petal Edge: Inner petals uniform, guard petals have point in center of margin.  
Shape: Round.  
Petaloids: 3 to 4.  
Texture: Thick.  
Arrangement: Imbricated.

**Reproductive Organs:**

Pollen:

Color: Yellow Group 2A.

Quantity: Limited.

Anthers:

Size: Small.

Color: Greyed-Yellow Group 160C.

Abundance: Average.

Filaments:

Color: Yellow-Green Group 145C,

with an intonation of Greyed-Purple Group 180B immediately below anther.

Stigmas: Slightly inferior in position relative to anthers.

Color: Greyed-Green Group 193C.

Styles:

Color: Yellow-Green Group 145C, with intonations of Greyed-Purple Group 180B immediately below stigma.

**PLANT**

Plant growth: Vigorous, compact. When grown as a 15 cm pot plant, the average height of the plant is 22 to 27 cm and the average width is 20 to 25 cm.

Stems:

Color:

Young wood. Yellow-Green Group 144A.

Older wood. Yellow-Green Group 144A.

Prickles:

Incidence. Few.

Size. Average length: 4 mm - 6 mm.

Color. Greyed Yellow Group 160C.

Shape. Linear.

Surface:

Young wood. Smooth.

Older wood. Smooth.

Plant foliage: Normal number of leaflets on leaves in middle of the stem. 5 leaflets.

Leaf size: 30mm (l) x 16mm (w).

Abundance. Very abundant.

Color:

Upper Leaf Surface: Green Group 137A/B.

Lower Leaf Surface: Green Group 137B.

Juvenile foliage. Green Group 138A.

Anthocyanin intonation.

None observed.

Plant leaves and leaflets:

Stipules:

Size. 8mm - 11mm.

Color. Green Group 137A with intonations of Green Group 143C.

Stipitate glands. Present on edges of

stipules.

Petiole:

Length. 9mm - 10mm.

Color. Yellow-Green Group 144A.

Underneath. Yellow-Green Group 144A

\_\_\_\_ Margins: Green Group 139A.

\_\_\_\_ Rachis:

\_\_\_\_ Color: Yellow-Green Group 144A.

\_\_\_\_ Underneath: Yellow-Green Group 144A.

\_\_\_\_ Margins: Green Group 139A.

\_\_\_\_ Leaflet:

\_\_\_\_ Edge: Serrated.

\_\_\_\_ Shape: Ovoid.

\_\_\_\_ Texture: Moderately thick, matte.

**Disease resistance:**

Average resistance to mildew, black spot, and Botrytis under normal growing conditions in Half Moon Bay, California.

CLAIM

A new and distinct variety of rose plant of the miniature class, substantially as herein illustrated and described as a distinct and novel rose variety due to its abundant, yellow flowers, vigorous and compact growth, year round flowering under glasshouse conditions, suitability for production from softwood cuttings in pots, and durable flowers and foliage which make the variety suitable for distribution in the floral industry.

AUG 15 2003

PLANT BREEDERS' RIGHTS APPLICATION FORM



(SEE INSTRUCTIONS)

THE INFORMATION ON THIS DOCUMENT IS REQUIRED BY THE GOVERNMENT OF CANADA FOR THE PURPOSE OF DETERMINING IF A PLANT BREEDERS' RIGHT IS TO BE GRANTED. THE INFORMATION IS NOT CONFIDENTIAL PRIOR TO PUBLICATION OF PARTICULARS IN THE PLANT VARIETIES JOURNAL. SOME INFORMATION MAY BE ACCESSIBLE OR PROTECTED AS REQUIRED UNDER THE PROVISIONS OF THE ACCESS TO INFORMATION ACT. INFORMATION THAT COULD CAUSE YOU OR YOUR ORGANIZATION INJURY IF RELEASED IS PROTECTED FROM DISCLOSURE AS DEFINED IN SECTION 20 OF THE ACCESS TO INFORMATION ACT.

APPFORM/25/08/97

|  |  |   |  |
|--|--|---|--|
| 1. NAME OF APPLICANT<br>(AS IT IS TO APPEAR ON THE CERTIFICATE)  |  | 3. PROPOSED DENOMINATION<br><b>POULmist</b>   |  |
| Poulsen Roser ApS  |  | IS THIS AN EXPERIMENTAL DESIGNATION? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO  |  |
| 2. ADDRESS OF APPLICANT<br><br>Hillerodvejen 49<br>Fredensborg, Denmark<br>DK-3480<br><br>PHONE NO. (INCLUDE AREA CODE): 45 48-48-3028<br>FAX NO. (IF AVAILABLE): 45 48-48-5578  |  | 4. OTHER DESIGNATIONS(S) (IF ANY)<br><br><input checked="" type="checkbox"/> YES (IF "YES" GIVE DESIGNATION AND COUNTRY OF USE)<br><br><input checked="" type="checkbox"/> NO      Mistral of the Parade® series. |  |
| 5. NAME OF AGENT<br><br>BRAMAN BARBACKI MOREAU, Mr. Fred Braman  |  |   |  |
| 6. ADDRESS OF AGENT<br><br>Suite 2707, 1, Place Ville Marie<br>Montreal, Canada H3B 4G4<br><br>PHONE NO. (INCLUDE AREA CODE) 514-871-9770      FAX NO. (IF AVAILABLE) 514-866-4773   |  |   |  |
| 7. NAME AND ADDRESS OF BREEDER, IF DIFFERENT FROM APPLICANT<br><br>same as applicant<br><br>PHONE NO. (INCLUDE AREA CODE)      FAX NO. (IF AVAILABLE)  |  |   |  |
| 8. GENUS AND SPECIES NAME<br><br>Rosa hybrida  |  | 9. FAMILY NAME (BOTANICAL)<br><br>Rosaceae  |  |
| 10. COMMON NAME<br><br>Rose  |  |   |  |
| 11. HAS AN APPLICATION FOR PROTECTION BEEN FILED OUTSIDE OF CANADA?<br><br><input checked="" type="checkbox"/> YES (IF "YES" GIVE NAMES OF COUNTRIES AND DATES)      EU 99/0081      29 January, 1999<br><br><input type="checkbox"/> NO     |  |   |  |
| 12. HAS THE VARIETY BEEN GRANTED RIGHTS IN OTHER COUNTRIES?<br><br><input type="checkbox"/> YES (IF "YES" GIVE NAMES OF COUNTRIES AND DATES)<br><br><input checked="" type="checkbox"/> NO   |  |   |  |
| 13. IS PRIORITY CLAIMED IN CANADA WITH RESPECT TO AN APPLICATION(S) MADE OUTSIDE OF CANADA? (SEE INSTRUCTIONS)<br><br><input type="checkbox"/> YES (IF "YES" GIVE NAME OF COUNTRIES AND DATES)<br><br><input checked="" type="checkbox"/> NO |  |   |  |
| 14. HAS THE VARIETY BEEN SOLD OUTSIDE OF CANADA?<br><br><input checked="" type="checkbox"/> YES (IF "YES" GIVE NAMES OF COUNTRIES AND DATES)      Denmark      29 January, 1999<br><br><input type="checkbox"/> NO                           |  |   |  |

DENOMINATION : POULmist

A

Origin and Breeding History of the Variety.

Crossing year : 1996

The crossing was made in the spring of 1996. Seeds were planted in December, 1996 and germinated during the winter and early spring. In the spring of 1997 the seedlings were selected in our greenhouses in Fredensborg, Denmark.

POULmist originated from a controlled crossing between:

An unnamed seedling and POULjol

and is a selection of one seedling among these seedling plants.

B

Statement of Uniformity and Stability.

POULmist is found to be uniform and stable in all trials. Trials for PBR are currently ongoing at Bunderssortenamt Station, Hannover, Germany.

C

Distinctness Statement.

The characteristics that distinguish it from other varieties:

The suggested comparison variety is POULgelb

A compact yellow rose variety suitable for use as a flowering pot plant. The variety has small flowers, glossy foliage, above average disease resistance, and above average shelf life. Propagated by cuttings in pots for forcing under glass and by traditional budding.

D

Sample of Propagating material (where applicable).

Samples of propagating material are available at the address of the breeder.

E

Methods for Maintaining the Variety.

Variety is maintained by vegetative propagation by cuttings or traditional budding unto rose rootstock. Vegetative material is available at the address of the breeder.

F

Evidence establishing the Legal Representative as the  
Applicant.

**DECLARATION.**

I/We the undersigned Mogens N. Olesen and L. Pernille Olesen acting as breeders of a variety of Rose designated by the variety denomination hereinafter proposed by ourselves :

POULmist

hereby certify :

1. That the said variety was never sold or offered for sale in Canada with the authorization of the breeder or one's assignees.
2. That the said variety was sold or offered for sale with the authorization of the breeder or ones assignees and this for the first time on :  
29 January, 1999.  
in the following country : Denmark.

Date, this 15 th day of July , 1999 .

By :

  
Mogens N. Olesen

  
L. Pernille Olesen

G

Authorization of an Agent.

DENOMINATION: **POULmist**

Applicant/Breeder: **Poulsen Roser ApS**

It is hereby certified, that we the undersigned :

Mogens N. Olesen and L. Pernille Olesen

are the owners of :

Poulsen Roser ApS,  
Hillerødvejen 49,  
DK-3480 Fredensborg,  
Denmark

and we hereby authorize Fred Braman and Braman,  
Barbacki, Moreau; Suite 2707, 1 Place Ville Marie,  
Montréal H3B 4G4 CANADA, to act for all purposes of  
the Canadian Plant Breeder's Rights Act on behalf of us  
as our agent in Canada for the above-noted denomination  
of rose.

DATED at the City of Fredensborg, Denmark, this

15 day of July, 1999.

**POULSEN ROSER ApS**

Signed :

per:

Name: Mogens N. Olesen  
Title: President &  
Rosebreeder

L. Pernille Olesen  
Vice President &  
Rosebreeder

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MIST001.EU  
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**COPY**

EUROPEAN UNION

COMMUNITY PLANT VARIETY OFFICE



**APPLICATION FOR COMMUNITY PLANT VARIETY RIGHT**

**TO THE COMMUNITY PLANT VARIETY OFFICE**

For use of National Agency only, if necessary

**Via National Agency :** .....

**File no. :** .....

For Office's use only

**Date of Application :** .....

**Priority date :** .....

**File number of Application :** .....

**Payment of the Application Fee :** .....

**Received on :** .....

|  |  |            |
|--|--|------------|
|  |  | Office use |
| <p><b>1. Applicant(s) : Name(s) :</b></p> <p><b>Pernille and Mogens N. Olesen, Poulsen Roser ApS,<br/>Hillerødvejen 49,<br/>DK-3480 Fredensborg,<br/>Denmark.</b></p> <p>Telephone : <b>+45 48 48 30 28</b>      Fax : <b>+45 48 48 55 78</b></p> <p><input type="checkbox"/> If natural person, indicate nationality and address :</p> <p>.....<br/>.....</p> <p><input type="checkbox"/> If legal person, firm or company indicate the address of its seat or establishment :</p> <p>.....<br/>.....</p> <p>Indicate name and address of the natural person being the legal representative of the legal person, firm or company :</p> <p>.....<br/>.....</p> <p>Telephone : .....      Fax : .....</p> |  |            |
| <p><b>2. If a procedural representative has been designated, please indicate his name and address and file the relevant signed credentials :</b></p> <p>(For applicants not having a domicile, seat or establishment within the territory of the European Union, a procedural representative with a domicile, seat or establishment therein is required)</p> <p>.....<br/>.....</p> <p>Telephone : .....      Fax : .....</p>  |  |            |
| <p><b>3. Address to which correspondence is to be sent if different from 1 or 2 :</b></p> <p>.....<br/>.....</p> <p>Telephone : .....      Fax : .....</p>   |  |            |
| <p><b>4. Botanical taxon :</b> Latin name of the genus, species or subspecies to which the variety belongs and the common name.</p> <p><b>Rosa (L) - rose</b></p>  |  |            |

|  |  |            |
|--|--|------------|
|  |  | Office use |
| <p>5. a) Where appropriate, proposal for the variety denomination<br/>(in BLOCK LETTERS) :</p> <p><b>POULMIST</b></p> <p>2. In any case, provisional designation (breeder's reference) for the variety<br/>(in BLOCK LETTERS) :</p> <p><b>POULMIST</b></p>   |  |            |
| <p>6. The original breeder(s) is (are) :</p> <p><input checked="" type="checkbox"/> the applicant(s)</p> <p><input type="checkbox"/> the following person(s) :</p> <p>Name(s) and address(es) :</p> <p>.....<br/>.....<br/>.....</p> <p>Telephone : ..... Fax : .....</p> <p>If the original breeder is not the applicant, how was the variety transferred to the applicant(s) :</p> <p><input type="checkbox"/> contract .....<br/> <input type="checkbox"/> succession .....<br/> <input type="checkbox"/> other (specify) .....</p> <p>Please provide relevant documentary evidence or fill out the attached form "assignment".</p> |  |            |

|  |  | Office use   |
|--|--|--|
| 7.   | <b>Details of all other applications made in a Member State of the EU or in a Member of the International Union for the Protection of New Varieties of Plants (UPOV) :</b> |  |
| <p>Please see attached separate sheet.</p>   |  |  |
| 8.   | <b>Priority is now claimed in respect of the earliest application for a property right filed :</b>   |  |
| in (country) .....   |  |  |
| On (date of application) .....   |  |  |
| 9.   | a) <b>Has the variety been sold or otherwise exploited ?</b>   |  |
| <ul style="list-style-type: none"> <li>- Within the territory of the European Union<br/>If yes, please indicate date and country of the first disposal of the variety and the designation used</li> </ul>  |  | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No<br>* |
| <ul style="list-style-type: none"> <li>- Outside the territory of the European Union<br/>If yes, please indicate date and country of the first disposal of the variety and the designation used</li> </ul> |  | <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No<br>* |
| b) In case of a variety which is repeatedly used in the production of one or more hybrid varieties, please indicate for each hybrid variety the same information as requested in a)                        |  |  |
| <ul style="list-style-type: none"> <li>*</li> </ul>  |  |  |
| c) Has the variety been disposed of under other circumstances than those mentioned under a) or b) by the breeder or with his consent? Please give the details :  |  |  |
| <p>NO</p>  |  |  |

|  | Office use |
|--|------------|
| <p><b>10. A technical examination for official purposes</b></p> <p><input type="checkbox"/> has already been carried out</p> <p><input type="checkbox"/> Is in the process of being carried out</p> <p>in : *</p>  |            |
| <p><b>11. The variety represents a Genetically Modified Organism within the meaning of Article 2 (2) of the Council Directive EEC 90/220 of 23.04.90?</b></p> <p><input type="checkbox"/> Yes</p> <p><input checked="" type="checkbox"/> No</p>  |            |
| <p><b>12. In case of a Community plant variety right granted, the certificate should be issued in the following official languages of the EU :</b></p> <p>English</p>  |            |
| <p><b>13. Application fee.</b></p> <p>Has the payment of the Application fee already been arranged? :</p> <p><input checked="" type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p> <p>Please fill in and attach the form "Details of Payment".</p>  |            |
| <p><b>14. The following forms or documents are attached to this application :</b></p> <p><input checked="" type="checkbox"/> 1   <input type="checkbox"/> 2   <input type="checkbox"/> 3   <input checked="" type="checkbox"/> 4   <input type="checkbox"/> 5   <input type="checkbox"/> 6   <input type="checkbox"/> 7   <input checked="" type="checkbox"/> 8   <input type="checkbox"/> 9</p> <p>The technical questionnaire and the credentials of any procedural representative form part of the application.</p> |            |

|   |            |
|---|------------|
|   | Office use |
| <ul style="list-style-type: none"> <li>- <b>I (We) hereby apply for the grant of the Community Plant Variety right.</b></li> <li>- <b>Authorization is hereby given to the Community Plant Variety Office to exchange with the Examination Offices and other competent authorities all necessary information and material related to the variety provided that the rights of the applicant are safeguarded.</b></li> <li>- <b>I (We) hereby declare that, to the best of my (our) knowledge, the information necessary for the examination of the application, given in this form and in the annexes is complete and correct.</b></li> <li>- <b>I (We) hereby declare that no further person or persons than that or those mentioned in this application has been involved in the breeding, or discovery and development of the variety.</b></li> </ul> |            |

Place : Fredensborg

Date : 26<sup>th</sup> January, 1999

Signature (s) :



**SEE INSTRUCTIONS**

**Separate sheet connected to point 7.**

|                          | <b>Filing<br/>State/date</b> | <b>Authority</b> | <b>Application<br/>Number</b> | <b>Stage</b> | <b>Variety denomination<br/>or breeder's reference</b> |
|--------------------------|------------------------------|------------------|-------------------------------|--------------|--|
| Plant Variety Protection |                              |                  |                               |              |  |
| Official Variety List :  |                              |                  |                               |              |  |
| Patent :                 |                              |                  |                               |              |  |

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## EUROPEAN UNION

Community Plant Variety Office  
TQ-EN-011

## TECHNICAL QUESTIONNAIRE

(to be completed in connection with an application for a Community Plant Variety Right)

For Office use only

DATE OF APPLICATION : .....

FILE NUMBER OF APPLICATION : .....

---

1. **Botanical taxon :**

Latin name of the genus, species or sub-species to which the variety belongs and common name :

011 Rosa L.

ROSE (vegetatively propagated varieties)

ROSIER (variétés à multiplication végétative)

ROSE (vegetativ vermehrte Sorten)

---

2. a) **Applicant(s) :**

Name(s) and address(es) and where appropriate name and address of the procedural representative :

**Pernille and Mogens N. Olesen, Poulsen Roser ApS**

**Hillerødvejen 49,**

**DK-3480 Fredensborg**

**Denmark**

**Original breeder(s) if different from applicant :**

Names and address(es)

---

---

3. a) Where appropriate proposal for a variety denomination :

**POULMIST**

Provisional designation (breeders reference) :

**POULMIST**

---

4. **Information on :**

4.1. Geographical origin of the variety :

**DENMARK**

4.2. Breeding, maintenance and reproduction of the variety.  
Please complete question 4 of the attached UPOV-extract.

4.2.1. Shall the information on data relating to components of hybrid varieties including date related to their cultivation be treated as confidential ?

Yes       No

If yes please give this information on the attached form for confidential information.

If no, please give information on data relating to components of hybrid varieties including data related to their cultivation :

Breeding scheme (indicate female component first)

---

5. **GMO-information required.**

The variety represents a Genetically Modified Organism within the meaning of Article 2(2) of the Council Directive EEC/90/220 of 23.04.1990.

Yes

No

---

6. **Characteristics of the variety to be given :**

Please complete question 5 of the attached UPOV extract.

(The number in brackets refers to the corresponding characteristics in the test guidelines. Please mark the state of expression which best corresponds).

| Number | Characteristics | Example varieties | Notes |
|--------|-----------------|-------------------|-------|
|--------|-----------------|-------------------|-------|

**The flowers have a bright, clear, deep yellow colour, which does not fade when dying. The wellformed flowers and buds are double and contain approx. 35 peatls. The size of the flower is 2 cm in height and 5,5 cm across. Very abundant. From 11-15 flower per potplant produced from 4 cuttings. Slightly fresh scent. Extremely good longevity.**

**The plant branches out very willingly. Bushy and even in growth. The plant is broad both from the bottom and on the top, which gives a harmonic impression. The foliage is dark green, slightly shiny with a smooth surface. Almost thornless. Healthy and hardy.**

---

7. **Closest variety(ies) and differences from those variety(ies) :**

| Denomination of the closest variety(ies) | Characteristic in which the closest variety(ies) Is(are) different   | State of expression of the closest variety(ies)<br>Candidate variety |
|--|--|--|
| <b>POULSET</b>                           | <b>Poulset does not give so many flowers. The longevity is not as good. The growth is not so bushy and the plant does not branch out so willingly.</b> |  |

---

8. **Additional information which may help distinguish the variety :**

8.1. Resistance to pests and diseases

**Very good**

8.2. Special conditions for the growing of the variety

**As a potrose for forcing under glass.**

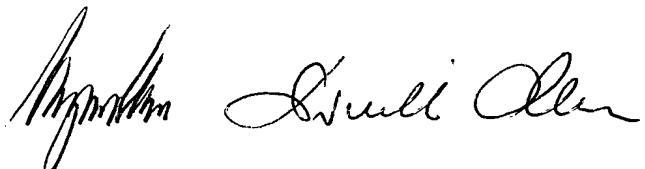
8.3. Other information (drawings, photographs, etc.)

---

I/We hereby declare that to the best of my/our knowledge the information given in this form is complete and correct.

Date : 26<sup>th</sup> January, 1999

Signature(s) :



**UPOV EXTRACT (CONTINUED)**

4. Information on origin, maintenance and reproduction of the variety.  
 Renseignements sur l'origine, le maintien et la reproduction ou la multiplication de la variété.  
 Informationen über Ursprung, Erhaltung und Vermehrung der Sorte.

**4.1. Origin/Origine/Ursprung**

i) Seedling/Plante de semis/Sämling (indicate parent varieties/préciser les variétés parentes/Elternsorten angeben)  [ x ]

**Unnamed seedling x Pouljol**

ii) Mutation/Mutation/Mutation (indicate parent variety/préciser la variété parente/Ausgangssorte angeben)  [ ]

\*

iii) Discovery/Découverte/Entdeckung (indicate where and when/préciser le lieu et la date/wo und zu welchem Zeitpunkt)  [ ]

\*

**4.2. Micropagation/Micropagation/Mikrovermehrung :**

The plant material has been obtained by micropagation Yes  [ ] No  [ x ]

Le matériel végétal a été obtenu par micropagation Oui  [ ] Non  [ ]

Das Pflanzenmaterial wurde mit Hilfe der Mikrovermehrung erzeugt Ja  [ ] Nein  [ ]

**4.3. Other information/Autres renseignements/Andere Informationen :**

i) Rootstock used/Port-greffe utilisé/Verwendete Unterlage

\*

ii) Other/Autres/Andere

**Is mainly propagated by cuttings in pots for forcing under glass, but can also be budded on an understock as a fieldgrown plant.**

5. Characteristics of the variety to be given (the number in brackets refers to the corresponding characteristic in the Test Guidelines; please mark the state of expression which best corresponds).

Caractères de la variété à indiquer (le chiffre entre parenthèses renvoie au caractère correspondant dans les principes directeurs d'examen; prière de marquer d'une croix le niveau d'expression approprié).

Anzugebende Merkmale der Sorte (die in Klammern angegebene Zahl verweist auf das entsprechende Merkmal in den Prüfungsrichtlinien; die Ausprägungsstufe, die der der Sorte am nächsten kommt, bitte ankreuzen).

|              | Characteristics<br>Caractères<br>Merkmale             | English      | Français           | Deutsch        | Example Varieties<br>Exemples<br>Beispielsorten | Note    |
|--------------|---|--------------|--------------------|----------------|---|---------|
| 5.1.<br>(1)  | Plant : growth habit (excluding climbing varieties)   | narrow bushy | buissonnant étroit | schmal buschig | Korpriva  | 1 [ ]   |
|              | Plante : port (à l'exclusion des variétés grimpantes) | bushy        | buissonnant        | buschig        | Meipoque  | 3 [ x ] |
|              | Pflanze : Wuchsform (Kletterarten ausgeschlossen)     | broad bushy  | buissonnant large  | breit buschig  | Fairy Prince                                    | 5 [ ]   |
| 5.2.<br>(21) | Pflanze : Wuchsform (Kletterarten ausgeschlossen)     | flat bushy   | buissonnant plat   | flach buschig  | Meicoursol                                      | 7 [ ]   |
|              |   | creeping     | rampant            | kriechend      | Korimro   | 9 [ ]   |
|              | Flower : type   | single       | simple             | einfach        | Korgosa   | 1 [ ]   |
| 5.3.         | Fleur : type  | semi-double  | demi-double        | helbgefüllt    | Meilanodin                                      | 2 [ ]   |
|              | Blüte : Typ   | double       | double             | gefüllt        | Red Queen                                       | 3 [ x ] |
|              | Flower : diameter                                     | very small   | très petit         | sehr klein     | Starina   | 1 [ ]   |
| 5.4.         | Fleur : diamètre                                      | small        | petit              | klein          | Meiburenac                                      | 3 [ x ] |
|              | Blüte : Durchmesser                                   | medium       | moyen              | mittel         | Korlima   | 5 [ ]   |
|              |   | large        | grand              | gross          | Pink Wonder                                     | 7 [ ]   |
|              |   | very large   | très grand         | sehr gross     | Meinatac  | 9 [ ]   |

Classification according to chapter V of the Test Guidelines

Classification selon le chapitre V des principes directeurs d'examen

Klassifizierung gemäss Kapitel V der Prüfungsrichtlinien

Miniature rose

5.4. Flower colour group/Groupe de couleur de la fleur/Blütenfarbengruppe

|                     |                        |                            |   |           |
|---------------------|------------------------|----------------------------|---|-----------|
| white or near white | blanc ou presque blanc | weiss oder annähernd weiss | Korbin,<br>Pascali<br>Youki San           | Gr. 1 [ ] |
| medium yellow       | jaune moyen            | mittelgelb                 | Goldilocks,<br>Korfou,<br>Bit O'Sunshine, | Gr. 2 [ ] |

|   |   |  |   |             |
|---|---|--|---|-------------|
| yellow blend<br>(includes varieties that are primarily yellow, but yet show some tones of pink-red) | mélange de jaune (inclus les variétés de couleur jaune dominante, mais également teintées de rouge rosé)                        | gelb gemischt (einschliesslich Sorten, die vorwiegend gelb sind, aber einige Tönungen von rosa-rot enthalten)                | Masquerade, Peace, Diamond Jubilee                | Gr. 4 [ ]   |
| deep yellow   | jaune foncé   | dunkelgelb   | Allgold, Buccaneer, Grandpa Dickson               | Gr. 3 [ x ] |
| apricot blend<br>(includes varieties that are primarily apricot, but show tones of some other hues) | mélange d'abricot (inclus les variétés de couleur abricot dominante, mais également teintées d'autres couleurs)                 | aprikosenfarben gemischt (einschliesslich Sorten die vorwiegend aprikosenfarben sind, aber einige andere Farbtöne enthalten) | Circus, Korgo, Woburn, Abbey, Macel               | Gr. 5 [ ]   |
| orange and orange blend (includes varieties primarily orange or orange with some other hues)        | orange et mélange d'orange (inclus les variétés de couleur orange, teintées ou non d'autres couleurs)                           | orange und orange gemischt (einschliesslich Sorten die vorwiegend orange sind oder orange mit anderen Farbtönen enthalten)   | Korp, Tanorstar, Zorina                           | Gr. 6 [ ]   |
| orange-red  | rouge orangé  | orangerot  | Spartan, Meirabande, Meteor                       | Gr. 7 [ ]   |
| light pink  | rose clair  | hellrosa   | Bridal Pink<br>Madame<br>Caroline<br>Testout      | Gr. 8 [ ]   |
| medium pink   | rose moyen  | mittelrosa   | Meichim, Meibil, Majorette                        | Gr. 9 [ ]   |
| pink blend<br>(varieties primarily pink, but show tones of other hues, yellow, orange, etc.)        | mélange de rose (inclus les variétés de couleur rose dominante, mais également teintées d'autres couleurs, jaune, orange, etc.) | rosa gemischt (Sorten, die vorwiegend rosa sind, aber ähnliche Farbtönungen enthalten, gelb, orange, usw.)                   | Johnago, Gail Borden, President<br>Herbert Hoover | Gr. 10 [ ]  |
| light red and deep pink   | rouge clair et rose foncé   | hellrot und dunkelrosa   | Tanellis, Buisman's Triumph, Prima Ballerina      | Gr. 11 [ ]  |
| medium red  | rouge moyen   | mittelrot  | Ama, Meilie                                       | Gr. 12 [ ]  |

|  |   |  |   |            |
|--|---|--|---|------------|
| dark red   | rouge foncé   | dunkelrot  | Europeana,<br>Crimson Glory<br>Meicesar | Gr. 13 [ ] |
| red blend<br>(varieties primarily red, but with tones of other hues, yellow, orange, etc.) | mélange de rouge (inclus les variétés de couleur rouge dominante, mais également teintées d'autres couleurs, jaune, orange, etc.) | rot gemischt (Sorten, die vorwiegend rot sind, aber Farbtönungen enthalten, gelb orange, usw.) | Tanol<br>Traviata,<br>Gal               | Gr. 14 [ ] |
| mauve<br>(varieties primarily lavender and purple)   | mauve (inclus les variétés principalement de couleur lavande et violette)   | fliederfarbig (Sorten, die vorwiegend lavendelfarben und purpurrot sind)                       | Lady X,<br>Lilac Charm<br>Fissan        | Gr. 15 [ ] |
| russet (varieties primarily brown or tan in color)   | brun rouge (inclus les variétés de couleur brune ou havane)   | rostbraun (Sorten die vorwiegend braun oder gelb-braun sind)                                   | Café,<br>Mojave,<br>Korval              | Gr. 16 [ ] |

5.5. Plant Growth Type/Plante : Type de croissance/Pflanzenwuchstyp :

|   |  |  |             |
|---|--|--|-------------|
| dwarf rose<br>(rarely exceeding 60 cm in height and spread)               | rosier nain<br>(dépassant rarement 60 cm en hauteur et en largeur)                               | Zwergrose<br>(selten mehr als 60 cm hoch und breit)                              | Ty. 1 [ x ] |
| bed rose<br>(compact growth, normally between 60 cm and 150 cm in height) | rosier de massif<br>(croissance compacte, normalement comprise entre 60 cm et 150 cm de hauteur) | Beetrose<br>(gedrungener Wuchs, normalerweise zwischen 60 cm und 150 cm in hoch) | Ty. 2 [ ]   |
| shrub rose<br>(growth dense to lax, height often exceeds 150 cm)          | rosier en buisson<br>(croissance dense à lâche, la hauteur dépasse souvent 150 cm)               | Strauchrose<br>(Wuchs dicht bis locker, Höhe oft über 150 cm)                    | Ty. 3 [ ]   |
| climbing rose<br>(growth normally exceeds 200 cm)                         | rosier grimpant<br>(la croissance dépasse généralement 200 cm)                                   | Kletterrose<br>(Wachstum normalerweise über 200 cm)                              | Ty. 4 [ ]   |

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EUROPEAN UNION

COMMUNITY PLANT VARIETY OFFICE

|  |   |  |
|--|---|--|
| <b>PROPOSAL FOR A VARIETY DENOMINATION</b> |   | Date of receipt<br>(for Office use only) |
| 1.   | <b>Applicant :</b> Name and address :   |  |
|  | <b>Pernille and Mogens N. Olesen, Poulsen Roser ApS,<br/>Hillerødvejen 49,<br/>DK-3480 Fredensborg,<br/>Denmark.</b>    |  |
| 2.   | <b>Provisional designation of the variety (breeder's reference) :</b>   |  |
|  | <b>POULMIST</b>   |  |
| 3.   | <b>Botanical taxon :</b> Latin name of the genus, species or sub-species to which the variety belongs and common name : |  |
|  | <b>Rosa (L) - rose</b>  |  |
| 4.   | <b>File no. :</b> If already known :  |  |
|  | *   |  |
| 5.   | <b>Proposal for a variety denomination :</b>  |  |
|  | <b>POULMIST</b>   |  |
|  | (Please propose only one and use CAPITAL LETTERS)   |  |

|    |  |                                    |
|----|--|------------------------------------|
| 6. | <b>If any, the preceding proposal for a variety denomination made to the Office :</b><br><br>*   | Office use only                    |
| 7. | <b>Denominations proposed for entry or entered in an official register in a Member State of the EU or in a Member of UPOV :</b><br><br><u>Filing State</u> <u>Stage</u> <u>Denomination (if different from 5 above)</u><br><br>*   |                                    |
| 8. | <input type="checkbox"/> The proposed denomination has been filed by or registered for the applicant (s) as a trademark in the EU or in a Member of UPOV or with the International Bureau of the World Intellectual Property Organization (WIPO) in respect of products that are identical or similar within the meaning of trademark law. |                                    |
|    | <u>State and/<br/>or WIPO</u> <u>Date of application</u> <u>Date of registration</u> <u>Registration<br/>number</u><br><br>*   |                                    |
|    | I/We hereby declare, that to the best of my/our knowledge, the above information given in this form is complete and correct.   |                                    |
|    | Fredensborg<br><hr/> (Place)   | 26th January, 1999<br><hr/> (Date) |
|    | Signature(s) :   |                                    |